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SUPREME COURT OF THE UNITED STATES

No. 1031

CAPITOL AIRWAYS, INC.,
Petitioner,

vs.

THE AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Capitol Airways, Inc., a Tennessee corporation engaged in business as an air carrier in both domestic and international air service pursuant to authority issued by the Civil Aeronautics Board, prays that the Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Sixth Circuit entered on February 10, 1965.

The said decision holds that a decision of a System Board of Adjustment created by collective bargaining contract pursuant to the mandate of Section 184, Title 45, U.S.C. must be enforced by the Federal District Courts if the collective bargaining contract is susceptible of the interpretation placed upon it by said Board.

Since air carriers and their employees are governed by the Railway Labor Act (Sections 151-188, Title 45, U.S.C.), Petitioner insisted below and here insists that it is the duty of Federal District Courts in reviewing decisions of System Boards of Adjustment to go further and make an independent interpretation of the legal obligations and rights of the parties.

OPINIONS BELOW

The opinion of the Court of Appeals is copied in the Appendix hereto at page A1.

The opinion of the District Court is copied in the Appendix hereto at page A4.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

The District Court is given jurisdiction by Section 1337, Title 28, U.S.C. and Section 2201, Title 28, U.S.C.

QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, air carriers are entitled to receive the same scope of judicial review of decisions of System Boards of Adjustment as rail carriers receive in actions to review decisions of divisions of the Adjustment Board. Petitioner insists that the answer should be "yes".

2. Whether the failure to provide for Judicial review of an order of a System Board of Adjustment is a denial of Due Process where the Air Carrier is compelled by statute

to enter into an agreement creating such System Board. Petitioner insists that the answer should be "yes".

3. Whether a Federal District Court, in reviewing an order of a System Board of Adjustment created by a collective bargaining contract pursuant to the Railway Labor Act, is required to make an independent interpretation of the legal obligations of the parties under the contract. Petitioner insists that the answer should be "yes".

4. Whether an airline may be required to reemploy and pay lost wages to a discharged pilot who has not been "exonerated" by the System Board of Adjustment where the only contract provision dealing with the reemployment of the discharged pilot provides "If as a result of any hearing as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period". Petitioner insists that the answer should be "no".

5. Whether an airline may be required by a System Board of Adjustment to reemploy a captain pilot who was discharged for attempting to smuggle goods into the United States aboard the aircraft, where the said System Board of Adjustment found that said captain was, in fact, guilty of attempted smuggling, where the only provision of the collective bargaining contract dealing with the reemployment of the discharged pilot provides, "If as a result of any hearing—a pilot is exonerated—he shall be reinstated". Petitioner insists that the answer should be "no".

STATUTES INVOLVED

Title 45, U.S.C., Sections 151-188, are the applicable statutes. Section 181 makes all of the earlier sections of the Railway Labor Act applicable to air carriers except Section 153. Section 184, however, provides:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title to establish a board of adjustment *of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment under the authority of section 153 of this title.*" (Emphasis added)

"Section 153 referred to in the above quoted statute, ¶ (p) states:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. *Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . . The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.*" (Emphasis added)

STATEMENT OF THE CASE

Petitioner is an airline operating in both domestic and international air service. A number of years ago, respondent was certified as the bargaining agent for Petitioner's pilots. This certification was made by the National Mediation Board under the provisions of the Railway Labor Act (Sections 181-188, Title 45, U.S.C.) After certification a collective bargaining contract was entered into between the parties and said contract has been renewed from time to time, although the renewals did not change the general provisions of the contract.

As a part of said collective bargaining contract and pursuant to the requirements of Section 184, Title 45, U.S.C., a System Board of Adjustment was created for the purpose of settling disputes which may arise between the parties under the collective bargaining contract.

Prior to the decision of this Court in *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 10 L. Ed. 2d 67, disputes involving four former pilots of Petitioner had been submitted to the System Board of Adjustment and said System Board had entered various Orders on behalf of said individuals as follows:

1. Pilot Hull was a Captain of a Trans-Oceantic Airliner, and on a flight from Frankfort, Germany, attempted to smuggle two valuable musical instruments into the United States without paying the applicable tax. These instruments were packed in a carton which was labeled "Spare Parts". The instruments were discovered by the Customs officials and when Hull realized the instruments had been discovered he persuaded one of the stewardsses who had not yet cleared Customs to list the instruments on her Declaration Form. Hull was discharged

after Petitioner investigated the matter and concluded that Hull had attempted to smuggle the instruments into the United States.

The System Board of Adjustment expressly found that Hull was in fact guilty of attempted smuggling. In so doing, the Board stated:

> "There is no question in my mind that Hull did attempt to smuggle or bring the instruments into the country without paying duty on them. Every bit of evidence points in this direction." (Appx. 69a)

The System Board also expressly quoted the pertinent or cited contract clauses and rules and regulations. (Appx. 60a)

The only contract provision quoted or cited by the System Board is Section 26 which is the only section in the contract in which Petitioner agreed to re-employ a discharged pilot. Sec. 26(c)(4) states:

> "If as a result of any hearing or appeal therefrom as herein provided, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period."

Notwithstanding this clear provision of the contract and without citing or referring to any other provision of the contract or attempting to construe any other provision of the contract as authorizing such action, the System Board ordered Petitioner to re-employ Hull but without back pay.

Petitioner insisted below and insists here that when the System Board failed to exonerate Captain Hull it had no authority to require Petitioner to re-employ him. Peti-

tioner insisted below and insists here that its obligation under the contract is not a severable obligation but is entire and that the System Board must either exonerate the pilot and thereby order him reinstated with back pay or it must, as a matter of law, sustain his discharge. The System Board is not authorized to compromise the dispute and substitute its own brand of industrial justice.

2. Pilot Gerhard was discharged and the record in this case is not so full as that in the Hull case. The entire decision of the System Board is as follows:

> "That Robert M. Gerhard be given a disciplinary layoff of three months, after which he should be reimbursed for the time lost on the basis of his average earnings for the three months period prior to December 20, 1960, less his earnings during the period after the expiration of layoff of three months. After the layoff of three months Gerhard shall be reinstated with all rights." (Appx. 80a)

It should be noted that, in addition to ordering Gerhard re-employed, a money award was made.

3. *Carlin*—The record in the Carlin case also is not as detailed as in the Hull case. The decision of the System Board states:

> "Yes, the discharge was justified, but the penalty imposed was too severe and he should have been suspended for a period of time instead of a complete dismissal". (Appx. 78a)

In this case the District Court, however, refused to enforce the award on the ground that the System Board expressly found that the question of discharge was not timely raised. The Court of Appeals, however, reversed the District Court in this regard holding that questions of procedure are exclusively within the province of the Board.

Petitioner's position in this case is the same as in the Hull and Gerhard cases, that is, the pilot was not only not exonerated, but the award shows clearly that he was guilty of substantial misconduct.

Petitioner, however, further insists in the Carlin case that the System Board award on its face shows that the requirements with reference to the timeliness of filing the grievance was not met.

Shortly after his discharge, Carlin filed his claim on May 3 and this claim only involved certain sums of money he claimed were due him. This item was settled, but on November 6 he amended his claim to include for the first time the question of his discharge. The question of discharge was not raised within the time provided in the contract. In this regard the System Board stated:

> "This Board is inclined to feel that there was an improper attempt to correct the letter of May 3 and that the letter of November 6 was filed out of time and cannot be given consideration. No satisfactory explanation was made to this Board at the hearing, although repeated efforts were made to obtain an explanation. The Board feels that this was outside the time limit by injecting new material into the controversy after the time had expired." (Appx. 78a-79a)

Since the System Board found as a fact that the question of discharge was not raised within the time limit set by the contract, Petitioner insisted and the District Court found that the System Board was without jurisdiction to hear the dispute.

4. Former Pilot Riley was awarded $4,800.00.

Shortly after the decision of this Court in *International Association of Machinists* v. *Central Airlines, supra*, Petitioner filed suit in the Federal District Court challenging the validity of the four awards.

Respondent filed an answer and counterclaim seeking enforcement of the four awards.

Both parties made motions for summary judgment and the District Court granted Petitioner's motion as to the Carlin and Riley awards and granted Respondent's motion as to the Hull and Gerhard awards.

Capitol duly perfected its appeal to the United States Court of Appeals for the Sixth Circuit whereupon Respondent filed a cross-appeal.

The Court of Appeals sustained the action of the District Court in the Hull, Gerhard and Riley cases but reversed the District Court in the Carlin case.

Under the present state of the record, therefore, Petitioner is required to comply with the awards in the Hull, Gerhard and Carlin cases and although the Carlin case involved a procedural matter which was different from any matter applicable to the other cases, the real question in issue is the same in all three cases. In each of the three cases the System Board of Adjustment failed to exonerate the pilots of the misconduct leading to their discharge and it is the insistence of the Petitioner that it has no obligation to reemploy or pay lost wages to discharged pilots who are not exonerated in accordance with the clear language of the contract.

In disposing of the case, neither the District Court nor the Court of Appeals at any point cited, mentioned or relied upon the Railway Labor Act or any decision arising thereunder although Air Carriers are expressly made subject to that Act.

Neither the District Court nor the Court of Appeals found or held that the decisions of the System Board were in accordance with the correct legal interpretation of the

contract but merely that the contract was *susceptible* to such interpretation. In this regard the Court of Appeals stated:

> "In our opinion, the arbitration cause of the collective bargaining agreement was susceptible of the interpretation placed upon it by the Board and the district judge was right in sustaining the Board."

Petitioner insists that it was the duty of the District Court to make an independent interpretation of Petitioner's obligations under the contract and it was error for the Court to limit its consideration as was done.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is in conflict with the decision of this Court in the case of *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 10 Law Edition 2d 67.

2. The Court of Appeals in this case has decided an important question of Federal law which has not but should be expressly and specifically settled by this Court.

3. The decision of the Court of Appeals in this case is in conflict with decisions of Courts of Appeals for other Circuits as follows:

1. *Washington Terminal Company* v. *Boswell*, 124 F.2d 335 (Affirmed by this Court 319 U.S. 733).

2. *Brotherhood, etc.*, v. *Atlantic Coast Line R. Co.*, 253 F.2d 753 (Court of Appeals for the Fourth Circuit).

3. *Dahlberg* v. *Pittsburgh and L. E. R. Co.*, 138 F.2d 121 (Court of Appeals for the Third Circuit).

4. *Jones* v. *Central of Georgia Railway Company*, 331 F.2d 649 (Court of Appeals for the Fifth Circuit).

In all of the foregoing cases the Courts of Appeals specifically held that it was the duty of the District Courts in reviewing orders under the Railway Labor Act to consider the merits of the cases and not to restrict the scope of review as was done by the Court of Appeals in the instant case.

ARGUMENT

QUESTIONS 1 AND 3

(1) Whether, under the Railway Labor Act, air carriers are entitled to receive the same scope of judicial review of decisions of System Boards of Adjustment as rail carriers receive in actions to review decisions of divisions of the Adjustment Board. Petitioner insists that the answer should be "yes".

(3) Whether a Federal District Court, in reviewing an order of a System Board of Adjustment created by a collective bargaining contract pursuant to the Railway Labor Act, is required to make an independent interpretation of the legal obligations of the parties under the contract. Petitioner insists that the answer should be "yes".

It is undisputed that the contract between the parties hereto was entered into in compliance with the Mandates of Section 184, Title 45, U.S.C.

In regard to the creation of the System Board of Adjustment by the parties, the contract specifically provides "In compliance with Section 204, Title 2, of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment—" (Appx. 47a)

This Court in the *Central Airlines* case, *supra*, repeatedly referred to the requirements of the Railway Labor Act. In the course of the opinion the Court stated:

"In 1936, Congress extended the Railway Labor Act to cover the then small-but-growing air transportation industry. 49 Stat. 1189, 45 U.S.C., §§ 181-188. Its general aim was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry. But there was to be a significant variation. The 1936 amendments made applicable to the airlines all of the provisions of the Railway Labor Act, excepting § 3, 45 U.S.C., § 153, dealing with the National Railroad Adjustment Board; but including § 1, 45 U.S.C., § 151, containing definitions; § 2, 45 U.S.C., § 152, the Act's statement of purposes; §§ 4 and 5, 45 U.S.C., §§ 154, 155, relative to the National Mediation Board and its functions; and §§ 7, 8 and 9, 45 U.S.C., §§ 157-159, relating to voluntary arbitration and emergency boards. § 202, 45 U.S.C., § 182. In the place of § 3, Congress provided in § 205, 45 U.S.C., § 185, that the creation of a National Air Transport Board would be postponed until 'in the judgment of the National Mediation Board, it shall be necessary to have a permanent board of adjustment. . . .' Until the establishment of the national board for the airlines industry, § 204, 45 U.S.C., § 184, required the formation of system, group, or regional boards of adjustment:

'It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of *jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.*' (Emphasis added)

The duty imposed upon the parties to create adjustment boards to settle grievances was more than a casual suggestion to the air industry. The original version of S. 2496, which, as amended, became law, provided for voluntary boards of adjustment as in the case of the railroads and extended the jurisdiction of the National Mediation Board to minor as well as

major disputes. But upon the suggestion of the National Mediation Board, its jurisdiction was not expanded, and the law as finally passed *made compulsory the establishment of the adjustment boards.* Until and unless the National Mediation Board determined to create a national board, the parties were placed under the statutory duty of establishing and utilizing system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes arising under existing contracts. (Emphasis added)

The obligation which § 204 fastened upon the carriers and their employees cannot be read in isolation. Its true significance must be drawn from its context as part of the Railway Labor Act which itself draws meaning from its history."

The Court further stated:

"In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional intent to move toward a reliable and effective system for the settlement of grievances, *we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards.* Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act." (Emphasis added)

The Court further stated:

"More specifically, the provisions of a § 204 contract, such as those governing the composition of the adjustment board, the procedures to be employed as

to notice and hearing or for breaking deadlocks, *or the finality to be accorded board awards, are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme.*" (Emphasis added)

The Court further stated:

"The Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.' *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623, 626 (C.A. 3d Cir.); *Washington Terminal Co.* v. *Boswell*, 75 App. D.C. 7, 124 F.2d 235, 244."

The Court further stated:

"Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose."

45 U.S.C. 184 compels the creation of a board of adjustment "of jurisdictions not exceeding jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment under the authority of section 153 of this title."

If the scope of review of system board awards is more limited than decisions of adjustment boards in railway cases, then this necessarily enlarges their jurisdiction contrary to the express provision of the Statute.

That Congress intended the same scope of review in Air Carrier cases is further demonstrated by the provisions of 45 U.S.C. 185. In regards the National Air Transport Adjustment Board said section provides:

> ". . . hearings shall be held, findings and awards *made, stated served, and enforced,* and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, *all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title.*" (Emphasis added)

From the foregoing Petitioner respectfully insists that this Court has in fact already ruled that the same rules for enforcement of System Board of Adjustment awards as are applicable in the railway industry apply to Air Carriers cases but since the Court did not by express terms so rule, Petitioner insists that the Court should now accept jurisdiction of this case and specifically spell out for the air industry just what scope of review it is entitled to receive from the Federal District Courts. This Court only recently in *Central Airlines* cleared the confusion of the Federal jurisdiction in such cases and should now go further and spell out the procedures applicable because this is a matter which will of necessity arise numerous times in the now vast air industry which is in operation throughout the entire United States.

Petitioner further insists that this Court should expressly rule that Air Carriers are entitled to exactly the same scope of review in District Courts as rail carriers are afforded under 45 U.S.C. 153 and that such review requires an independent interpretation of legal obligations under the contract.

QUESTION 2

(2) Whether the failure to provide for Judicial review of an order of a System Board of Adjustment is a denial of Due Process where the Air Carrier is compelled

by statute to enter into an agreement creating such System Board. Petitioner insists that the answer should be "yes".

If decisions of a System Board of Adjustment are binding on the courts as to either law or fact then the statute would be unconstitutional. It must be remembered that the System Board is not a public or governmental agency but is a private agency created pursuant to the statutory mandate. To permit such an agency to make either findings or fact or legal determinations final and binding is a denial of due process because neither the System Board nor the procedures before such Board afford even the most basic requirements of due process.

In *Washington Terminal Company* v. *Boswell*, 124 F.2d 235, affirmed 319 U.S. 733, the Court of Appeals stated:

> "Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, *if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law.* But, as has *been shown, they have no such quality.*" (Emphasis added)

The Court further stated:

> "The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

To the same effect the Court of Appeals for the Third Circuit in *Dahlberg* v. *Pittsburgh, etc.*, 138 F.2d 121, stated:

> "If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in *Washington Terminal Co.* v. *Boswell,* 75 U.S. App. D.C. 1, 124 F.2d 235, 276, 'There can be no valid delegation of governmental power to non-governmental agencies. *Carter* v. *Carter Coal Co.*, 1936, 298 U.S. 238. The Adjustment Board, consisting of bipartisan groups paid by and set up to represent the employees and carriers respectively, is not a governmental agency.' "

It must be remembered that the creation of the System Board of Adjustment and the agreement relative thereto are not the results of a private voluntary agreement but are the result of a mandatory requirement of the Act. Therefore, the decisions arising under the Labor Management Relations Act regarding arbitration disputes have no bearing whatever in this case because in those cases the arbitration agreement was the voluntary act of the parties rather than the result of a statutory requirement.

As pointed out in the decisions above quoted, the statutory compulsion of settlement of disputes without the right to full judicial review raises very serious questions of constitutional law.

This Court has held in numerous cases that in construing a statute the Court will avoid a construction which even raises a serious question of constitutional law. In this regard in *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 81 L. Ed. 1143, the Court stated:

> "We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.' *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 307, 68 L. Ed. 696, 701, 44 S. Ct. 336, 32 A.L.R. 786; *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 390, 68 L. Ed. 748, 754, 44 S. Ct. 391; *Blodgett* v. *Holden*, 275 U.S. 142, 148, 72 L. Ed. 206, 210, 48 S. Ct. 105." (301 U.S. 351, 352)

Certainly a construction of the statute which requires a carrier to enter into an agreement for the establishment of a System Board of Adjustment and which makes findings of said Board final and binding without regard to the fact that such Boards are not composed of lawyers, do not follow legal procedures as to pleadings and evidence and which completely ignore all basic principles of contract construction would clearly be violative of due process guaranteed under the Fifth Amendment. A construction, however, which affords full judicial review of the orders of such System Boards of Adjustment, certainly as to legal questions, would eliminate the constitutional question.

Petitioner, therefore, respectfully insists that for the Courts to limit the scope of review of orders of System Boards of Adjustment as was done in the cases now before this Court is a denial of due process. If such is the real intent of the statute then the entire statute is unconstitutional but if a full and complete judicial review is afforded then the statute is constitutional and valid.

QUESTIONS 4 AND 5

(4) Whether an airline may be required to reemploy and pay lost wages to a discharged pilot who has not been "exonerated" by the System Board of Adjustment where the only contract provision dealing with the reemployment of the discharged pilot provides "If as a result of any hearing as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period." Petitioner insists that the answer should be "no".

(5) Whether an airline may be required by a System Board of Adjustment to reemploy a captain pilot who was discharged for attempting to smuggle goods into the United States aboard the aircraft, where the said System Board of Adjustment found that said captain was, in fact, guilty of attempted smuggling, where the only provision of the collective bargaining contract dealing with the reemployment of the discharged pilot provides, "If as a result of any hearing—a pilot is exonerated—he shall be reinstated." Petitioner insists that the answer should be "no".

The contract between the parties hereto has only one section which in any way directly or indirectly discusses or even mentions the obligation of petitioner to reemploy a pilot who has been discharged. This section is Section 26. (Appx. 34a) The only portion of this section which in any way contains a promise to reemploy is Sub-Section c(4) and reads as follows:

> "If as a result of any hearing or appeal therefrom as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in

> an amount which he would have ordinarily earned had he been continued in service during such period." (Appx. 36a)

It will be noted that this obligation is entire and not severable and there is no way this section can be construed to give a System Board authority to fail to exonerate a pilot of substantial misconduct and yet compromise the dispute by ordering him re-employed but without back pay.

Neither the District Court nor the Court of Appeals at any point or place held that a proper construction of the contract would give the System Board authority to do what it did in these cases but merely held that the contract was susceptible to such interpretation.

Neither the District Court nor the Court of Appeals cited or in any way referred to any decision arising under the Railway Labor Act but relied solely upon decisions dealing with arbitration cases arising under Section 301 of the Labor Management Relations Act.

Petitioner insists that this alone was error because the parties hereto are governed by the Railway Labor Act. Furthermore, the provision of the contract creating the System Board states that it is made in compliance with Section 204, Title II (45 U.S.C. 184) (Appx. 47a) and also provides:

> "Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provisions of the Railway Labor Act, * * *" (Appx. 51a)

Without waiving the foregoing, petitioner insists that the decisions of this court do not support the conclusions reached by the lower courts.

On June 20, 1960 this court decided three cases dealing with enforcement of arbitration agreements. These cases are *United Steel Workers* v. *American Manufacturing Co.*; *United Steel Workers of America* v. *Warrior, etc.*; and *United Steel Workers* v. *Enterprise*. All of these cases are reported in 4 L. Ed. 2d beginning at page 1403, and in 363 U.S. beginning at page 564.

The District Court quoted from the *Warrior* case (Appx. 157a) as follows:

> "An order to arbitrate the particular grievance [contracting out work] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of the interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." At page 582.

It will be noted that this case involved an order to arbitrate and not the enforcement of an arbitration award.

The only one of the decisions which involved enforcement of an award is the *Enterprise* case. In that case, however, the court stated:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*" (Emphasis added)

It will be noted that this court has never said that a court must enforce an arbitration award that is contrary to the plain provisions of the contract. If the contract is susceptible of an interpretation reached by the arbitrator

using fundamental basic principles of contract construction, then the court should enforce, but the court should not ignore such legal construction principles in determining whether the contract is susceptible of the arbitrator's interpretation. If this is not true, then no one can draw a contract and know what it means.

In the case now before the Court, it is necessary to ignore all basic principles of contract construction in order to reach the conclusion that the awards are valid because:

1. Section 26 of the contract precedes Section 27 which was referred to by the District Court (Appx. 158a) as authorizing the awards.

2. Section 26 deals specifically with discipline and discharge while Section 27 merely provides:

> "Any pilot or group of pilots covered by this Agreement who have a grievance concerning any action of the Company affecting them, not settled in conference with Company officials, shall be entitled to have such grievance handled in accordance with the procedure established in Section 26 hereof for investigation and hearing or appeal." (Appx. 37a)

It will be noted that even Section 27 expressly refers to Section 26 and does not pretend to negative the conditional requirements of Section 26.

3. The only promise to re-employ is a conditional promise starting with the word "If".

The distinction between this case and the Steel Workers cases is clearly illustrated by a statement in the separate opinion reported at 363 U.S. 569. There the opinion states:

> "* * * for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no com-

pulsion in law requiring them to include any such promise in their agreement."

Here there is "compulsion in law" to create the System Board.

CONCLUSION

Petitioner most respectfully insists that the lower courts erred in failing to apply the same scope of judicial review as is applicable in railroad cases under the Railway Labor Act.

The lower courts also misconstrued the decisions of this Court in labor arbitration cases arising under the Labor Management Relations Act.

Petitioner also most respectfully insists that the scope of judicial review in airline cases involves a very important question affecting the entire air industry and should be settled by a decision of this Court.

Petitioner further respectfully insists that the decisions of the lower courts are erroneous and should be reversed.

Respectfully submitted,

JUDSON HARWOOD,
515 Nashville Bank & Trust Building,
Nashville, Tennessee,
Attorney for Capitol Airways, Inc.

APPENDIX A

Opinion of Court of Appeals
Nos. 15660-1

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CAPITOL AIRWAYS, INC.,
Plaintiff-Appellant,
v.
THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Appellee.

CAPITOL AIRWAYS, INC.,
Plaintiff-Cross-Appellee,
v.
THE AIRLINES PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Cross-Appellant.

ON APPEAL from the United States District Court, for the Middle District of Tennessee.

Decided February 10, 1965.

(Filed February 10, 1965)

Before: WEICK, Chief Judge, CECIL, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM. These appeals arise out of the adjudication of an action for declaratory judgment (Title 28, Sec-

tion 2201, U.S.C.) brought in the United States District Court for the Middle District of Tennessee, Nashville Division, by Capitol Airways, Inc., plaintiff, against The Airline Pilots Association, International, defendant. The parties will be referred to as Capitol and ALPA, respectively. Capitol brought the action in the District Court for a declaration that four awards, in favor of grievants, Riley, Hull, Gerhard and Carlin, and against Capitol, made by The Capitol Airways System Board of Adjustment (referred to herein as Board) were invalid. The court on motions for summary judgment sustained the awards as to Hull and Gerhard and held the awards in favor of Riley and Carlin invalid. Capitol appealed from the adverse ruling on the Hull and Gerhard awards, and ALPA filed a cross-appeal from the adverse ruling to it on the Carlin and Riley awards.

The opinion of William E. Miller, the trial judge, is reported at . . . F. Supp. . . . We agree with his conclusions as to the Riley, Hull and Gerhard awards. Capitol argues that the trial judge did not make a de novo interpretation of the contract. In our opinion, the arbitration clause of the collective bargaining agreement was susceptible of the interpretation placed upon it by the Board and the district judge was right in sustaining the Board. We affirm the judgment of the District Court on these three awards on the opinion of District Judge Miller.

The Carlin award presented a procedural question: Was the issue of Carlin's dismissal properly before the Board? On May 3, 1962, a letter was sent to the Board on behalf of Carlin in which it was requested to determine three things: 1. "That the Company was in violation of the Employment Agreement." 2. "That the grieving pilot be compensated for all losses monetary or other sustained by him in consequence of the alleged wrongful action of the Company." 3. "That the grievant have such other fur-

ther or different relief as to the Board may be deemed just and proper." On November 6, 1962, another letter was sent to the Board on behalf of Carlin with an additional request for relief: "That the grievant be reinstated with back pay and all attendant rights."

The Board found that the letter of November 6th was not timely filed and could not be given consideration. It held further that the matter in controversy was properly before it and that it had jurisdiction to hear the dispute and the appeal. The Board found that Carlin's discharge was justified but that the penalty was too severe. He should have been suspended for a period of time instead of a complete discharge. The award of the Board provided that Carlin be reinstated with no pay for time lost and that he was entitled to his seniority rights and their attendant privileges.

The district judge held that the question of discharge was not properly before the Board for the reason that the letter of November 6th was not timely filed. For this reason he held that the award was invalid.

The Court has held that procedural questions are to be determined by the arbitrator rather than the Court. *Avco Corp. Electronics & Ordnance Div.* v. *Mitchell*, 336 F.2d 289; *Local 748, etc.* v. *Jefferson City Cabinet Co.*, 314 F.2d 192, cert. den., 377 U.S. 904. The judgment of the District Court as to the Carlin award is reversed and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

Opinion of District Court

In the
DISTRICT COURT OF THE UNITED STATES
For the Middle District of Tennessee,
Nashville Division.

CAPITOL AIRWAYS, INC., Plaintiff, v. THE AIRLINE PILOTS ASSOCIATION INTERNATIONAL, Defendants.	Civil Action No. 3493.

Memorandum—Filed October 18, 1963

This is an action for Declaratory Judgment brought under Title 28, Section 2201, U.S.C. The Capitol Airways System Board of Adjustment (herein referred to as Board), established in compliance with Section 204, Title II of the Railway Labor Act as amended (Title 45. Section 151, et seq., U.S.C.), has made the awards here involved in favor of the grievants, Riley, Hull, Gerhard, and Carlin, and against the plaintiff airline. The plaintiff seeks an adjudication that the four awards are invalid. Defendant counterclaims for enforcement of the four awards. Both parties have moved for summary judgment. The four awards present three different issues which will be considered separately.

RILEY AWARD.

This award presents the question of whether or not the Board could order payment of four months' pay (or not less than $4800) without reinstatement, under these circumstances: Riley, among others, had worked for Aaxico. When Aaxico lost its government "Logair" contract to Capitol, Capitol agreed to hire the Aaxico pilots. An agreement was entered into which on its face purports to employ this group of pilots without reservation. However, according to an affidavit of Mr. Mack Rowe, a company official, it had been distinctly understood that Capitol would not continue to employ these pilots after the expiration of the then current government contract unless it was awarded a new Logair contract then being negotiated.[1]

Capitol did not get the contract and the Aaxico pilots were furloughed. However, Aaxico did get the contract and rather than rehire its old pilots, contracted with IASCO (a company organized to provide airline crews under contract) to fill its requirements for pilots. Riley and the other Aaxico pilots filed suit on August 24, 1961

---

1. Counsel for defendant raises the question of whether the Court can consider the affidavit of Mr. Rowe since it is in relation to the written contract of employment between Capitol and ALPA, and is thus "parol evidence". The contract, it is urged, shows on its face that Riley was included in the collective bargaining agreement, and this cannot be impeached by the affidavit. The Court does not consider this evidence inadmissible. This is in effect, if not in precise form, the situation presented in an example given by Professor Corbin:

> "A writes out the terms of an agreement, signs it, and delivers it to B . . . saying . . . that he offers it for immediate acceptance, but that the promises contained therein are to be enforceable as a contract only in case event X happens. B accepts A's offer and signs the document. Here also it is almost universally held that B can enforce the contract against A only on condition that event X happens. In this case there is a valid contract, but the promises of one or both parties therein are subject to an extrinsic condition precedent which must be proved and is permitted to be proved by parol evidence." 3 *Corbin on Contracts*, Section 577 (5), page 392.

in the Federal District Court at San Antonio, Texas, asking for injunctive relief against Aaxico based on Aaxico's refusal to rehire them. In this suit the pilots were successful. These facts are admitted by the defendant.

On October 13, 1961, while Riley was flying for Riddle Airlines in Oklahoma, Capitol sent the following form letter to him:

> "Dear Mr. Riley: Please advise immediately if you will accept recall as co-pilot at San Antonio or Tinker. Duration is unknown at present and we will not grant leave of absence in lieu of recall."

Following receipt of this letter Riley left Riddle Airlines and returned to San Antonio. Mr. Rowe states that this was a form letter sent out to ascertain availability of pilots, and that it was sent to many more pilots than would have ultimately been needed. This is also not denied.

There are three "contracts" involved here: the Aaxico contract, the Capitol contract with the Aaxico pilots, and the letter of October 13, 1961, to Riley. It was apparently neither the theory of the defendant, Airline Pilots Association, (herein referred to as ALPA), nor Riley, nor the view of the Board, that this grievance was a result of the general employment contract between Capitol and the Aaxico group.[2] Based upon the evidence presented in the affidavit of Mr. Rowe, which is not denied by the defendant, the Court finds that Riley was not covered by the collective bargaining agreement after expiration of Capitol's Logair contract and its resumption by Aaxico.

The Board found in effect that the letter of October 13, 1961, was an offer of employment, that Riley accepted the

---

2. As stated by the Board in its award, "It is evident that had the letter of October 13, 1961 never had [sic] been send [sic] out these two cases would not now be pending before this board."

offer, and that the acceptance constituted a contract which Capitol breached and for which damages were awarded. Since Riley was not then covered by the collective bargaining agreement, the question arises whether the Board had authority to determine the effect and validity of an alleged contract of employment—an individual contract between the employee and the company, and one outside the collective bargaining agreement. The answer must be in the negative.

The agreement to arbitrate states in paragraph (b):

> "[T]here is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Pilots' Agreement."

and in paragraph (e):

> "The Board shall have jurisdiction over disputes between any employee covered by the Pilots' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement."

The rule which limits the authority of the Board is found in a case cited by defendant—one of the "triumvirate" of Supreme Court opinions, to use defendant's term:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrators' words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

Clearly the dispute as to whether the company offered employment to Riley in its letter of October 13, 1961, is outside the scope of the collective bargaining agreement. As such it is an issue or dispute which the company did not agree to submit to arbitration and for that reason the award is invalid.

HULL AND GERHARD AWARDS.

In these two awards the Board found the employees guilty of the charges which resulted in their dismissal. Nevertheless, it ordered reinstatement without back pay on the basis that dismissal was too severe a punishment and not warranted under the circumstances. The question presented is whether or not in ordering reinstatement the Board, having found the employees guilty of the charges, exceeded its authority under the collective bargaining agreement and under the agreement establishing it and defining its powers and procedures.

The record presents more fully the facts underlying the Hull award.[3] In that case Hull was senior pilot on an overseas flight for Capitol from Frankfort, Germany, to Philadelphia. Hull had purchased two musical instruments in Germany and on arrival in Philadelphia had persuaded a stewardess to declare them on her customs form. The Board found on the basis of the surrounding facts that Hull had been attempting to smuggle the instruments into the country and avoid paying the customs duty on them. The company dismissed Hull as a result of its investigation of the matter.[4] On appeal to the Board Hull was ordered reinstated with full seniority, but without back pay.

---

3. Gerhard refused to fly a ferry flight. The Board partially exonerated him by finding that the company was to some degree also at fault in the matter.

4. The Operations Manual (incorporated by reference into the agreement), Chapter 3, Section 9, paragraph G (10), provides in substance that, inter alia, a crew member may be dismissed for smuggling.

The company contends that the Board was without authority to order reinstatement without a finding that the charge of attempted smuggling was unfounded and thereby exonerating Hull. As the basis for its contention the company directs attention to Sections 26 (c) (4) and (5) of the collective bargaining agreement:

> (4) "If as a result of any hearing or appeal therefrom as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period."
>
> (5) "If as a result of any hearing or appeal therefrom as provided herein the pilot shall be exonerated, the personnel records shall be cleared of the charges."

The company's rationale is that this is the only reference in the contract to reinstatement after discharge, and therefore should be controlling. In essence the argument is that because the words provide for reinstatement in event of exoneration, they imply that there can be no reinstatement without exoneration. There can be no question that Hull was not exonerated by the Board,[5] but there is no weight in the argument that by negative implication there can be no middle ground in which the Board may operate. It is not an "either/or" situation.

On the other hand, ALPA argues that the question presented to the Board in the Hull case was whether Hull had been discharged for "just cause", that an employee can insist that his discharge was without just cause and have the issue presented to the Board under this agree-

---

5. As stated by the Board: "6.1 There is no question in my mind that Hull did attempt to smuggle or bring the instruments into the country without paying duty on them. Every bit of evidence points in this direction."

ment, and that such questions are properly termed "grievances." Section 27 of the agreement provides:

> "Any pilot or group of pilots covered by this agreement who have a grievance concerning any action of the company affecting them, not settled in conference with company officials, shall be entitled to have such grievance handled in accordance with the procedure established in Section 26 hereof, for investigation and hearing or appeal"

and Section 21 provides:

> "Any pilot who resigns from the service of the company or is discharged *for just cause* will forfeit all seniority accrued to date of such resignation or discharge." (Emphasis supplied.)

The defendant argues that Section 21 illustrates that discharges are only to be for just cause, and that Section 27 in providing for arbitration of any "grievance concerning any action of the company affecting [him]" contemplates that the issue of justifiable discharge will be arbitrated.

The Ninth Circuit Court of Appeals in *Operating Engineers Union Local No. 3* v. *Crooks Brothers Tractor Co.*, 295 F.2d 282 (1961), held that under a collective bargaining agreement which provided that "no employee shall suffer discharge without just cause", a discharge for subordination was a proper subject for a grievance proceeding. In reaching its conclusion the Court cited *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960):

> "An order to arbitrate the particular grievance [contracting out work] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of the interpretation that

covers the asserted dispute. Doubts should be resolved in favor of coverage." At page 582.

Although the agreement in the present case is not so explicit as to set out that no discharge should be without just cause, the language in the agreement is sufficiently broad to include the lack of just cause as a proper grievance. A decision of the company to discharge an employee for misconduct, even if the employee is guilty, may or may not be for just cause. If the offense and the circumstances accompanying it are sufficient to warrant such a penalty, just cause would exist, but it is also true that in many cases such a penalty may be excessive and unwarranted. The penalty actually imposed by the company is an "action of the company affecting" the employee and consequently constitutes the subject of a grievance as defined in Section 27 of the agreement.

Therefore, it cannot be said that the Board exceeded its authority in mitigating the punishment and ordering reinstatement without exonerating the employees.

CARLIN AWARD.

This award likewise could have involved the issue of whether the Board exceeded its authority in ordering reinstatement without exoneration. However, it raises the preliminary question which must be considered: From a procedural standpoint was the issue of Carlin's dismissal properly presented to the Board for its adjustment?

The Agreement provides in Section 26 (7):

"If after the appeal provisions hereinbefore provided have been complied with, further appeal by the pilot, if made, shall be to the . . . System Board of Adjustment, . . . provided such appeal is made within thirty (30) days from the date of receipt by the pilot

or his duly accredited representative, of the decision of the company."

The agreement which establishes the Board provides in Section (h) that:

> "All disputes properly referred to the Board for consideration shall be addressed to the Chairman. . . . Each case submitted shall show:
>
> 1. Question or questions at issue.
>
> 2. Statement of facts.
>
> 3. Position of employee or employees.
>
> 4. Position of Company."

On May 3, 1962 a letter was sent to the Chairman Pro Tem of the Board by the President of ALPA submitting the grievance of Lawrence P. Carlin. In that letter the "Question at Issue" was stated as follows:

> "Was the Company in violation of the Employment Agreement with respect to the Pay Section and related sections, when the Company failed to properly pay the grievant for December, 1961 and January, 1962, and, further, failure to reimburse him for expenses advanced to him on behalf of the Company while on duty?"

The letter of May 3, 1962 also asked that the Board determine three things by way of relief:

> "1. That the Company was in violation of the Employment Agreement as herein set forth.
>
> "2. That the grieving pilot be compensated for all losses monetary or other sustained by him in consequence of the alleged wrongful action of the Company; and

"3. That the grievant have such other, further or different relief as to the Board may be deemed just and proper."

On November 6, 1962 ALPA sent a second letter to the Board which was substantially identical to the letter of May 3, 1962, except the following was added to the end of the paragraph headed "Question at Issue":

". . . and further, for removing him from the payroll on February 26, 1962, for reasons assigned by W. W. Ashley in his letter of February 26, 1962."

The following additional relief was inserted as item (2):

"That the grievant be reinstated with back pay and all attendant rights?"

The Board in its written award stated:

"This matter comes to be heard on the application of Captain L. J. Carlin in which he seeks to be reinstated with the company from date of discharge with all rights of seniority unimpaired.

The facts are substantially as follows: Captain L. J. Carlin had been with the Capitol Air Ways, Inc. since 1956. He was dismissed by the company for alleged violations of the rules and regulations relating to conduct. The following questions are presented:

(a) Was this matter properly before the Board of Adjustment?

* * * * * * *

(d) Was there a change made in the letter introduced in evidence dated May 3, 1962 and subsequently corrected as of November 6, 1962 when a new paragraph was added and was this a violation of the Agreement and particularly did it come outside the time limit and injected [sic] new material into the dispute after the time limit had expired?"

The Board then disposed of these issues:

> "(a) We hold that the matter in controversy was properly before the Board and that it had jurisdiction to hear the dispute and the appeal.
>
> * * * * * * *
>
> (d) This Board is inclined to feel that there was an improper attempt to correct the letter of May 3 and that the letter of November 6 was filed out of time and cannot be given consideration. No satisfactory explanation was made to this Board at the hearing, although repeated efforts were made to obtain an explanation. The Board feels that this was outside the time limit by injecting new material into the controversy after the time had expired."

But, paragraph (d) to the contrary notwithstanding, the Board concerned itself primarily with Carlin's discharge and said in paragraph (c):

> "Yes, the discharge was justified, but the penalty imposed was too severe and he should have been suspended for a period of time instead of complete dismissal."

The Board then proceeded to order:

> ". . . that Captain L. J. Carlin be and he is hereby ordered to be reinstated as of this date but with no pay for time lost. Captain Carlin is also entitled to reinstatement with seniority rights and its attendant privileges."

No cases or authorities have been cited to the Court which have a direct bearing on this problem. It seems reasonable to assume that ALPA in its letter of May 3 simply overlooked including the matter of discharge and reinstatement which was subsequently included in the later letter. However, it could just as well have been that ALPA deliberately did not include this matter in

the first letter, and only later decided to pursue reinstatement. In either event Carlin had been dismissed in February and apparently his dismissal had been negotiated at the preliminary level prior to appeal to the Board.

Did the Board have authority to consider the question of Carlin's dismissal and order reinstatement? It may be that in some instances circumstances would permit an amendment to present issues not set forth in a timely letter of notice of appeal to the Board. However, the grievant offered the Board no explanation and no justification for ALPA's attempt to present the issue of dismissal for the first time six months after the original letter. The Board itself found that the matter presented by the letter of November 6 was untimely and an improper attempt to correct the letter of May 3, and could not be given consideration.

ALPA stands on the written award of the Board and has not presented to the Court any sound reason to establish the authority of the Board to consider an issue which was raised long after expiration of the contractual time limitation. No facts are shown to suggest the possibility of a waiver or to excuse for any reason the failure to raise the issue of dismissal within the agreed time. Nor are any facts developed to show that this was a situation in which the Board may have been warranted in considering the November letter as an amendment which related back to the original letter. It is simply a situation, as the Board stated, of an unexplained delay. The second letter therefore clearly cannot be considered in determining the validity of the award of the Board in the Carlin case.

The two issues, the company's refusal to pay grievant for two months and its failure to reimburse him for his expenses, properly presented to the Board in the letter of

May 3, 1962, were the only issues which the Board had authority to determine and any relief granted by it could relate solely to these actions of the company. Thus, the Board was without authority to order reinstatement of the grievant.

Accordingly, the plaintiff's motion for summary judgment on its complaint will be granted as to the Riley and Carlin awards, and will be denied as to the Hull and Gerhard awards. The defendant's motion for summary judgment on its counterclaim for enforcement of the Hull and Gerhard awards will be granted and denied as to the Riley and Carlin awards.

An order consistent with this opinion will be submitted for the approval of the Court.

/s/ Wm. E. Miller,
United States District Judge.

Attest: A True Copy.

Andrew H. Mizell, Clerk,
U. S. District Court,
Middle District of Tennessee,
By L. M. Edwards, D. C.

(Seal)

APPENDIX C

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 15,660

CAPITOL AIRWAYS, INC.,
Plaintiff-Appellant

vs.

THE AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Defendant-Appellee.

BEFORE: WEICK, Chief Judge, CECIL, Circuit Judge, and TAYLOR, District Judge.

Judgment

(Filed February 10, 1965)

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

A True Copy.

Attest:

Carl W. Reuss, Clerk

APPENDIX D

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 15,661

CAPITOL AIRWAYS, INC.,
Plaintiff-Cross-Appellee,

vs.

THE AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Defendant-Cross-Appellant.

BEFORE: WEICK, Chief Judge, CECIL, Circuit Judge, and TAYLOR, District Judge.

Judgment

(Filed February 10, 1965)

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as to the Riley award and reversed and remanded for further proceedings consistent with the opinion as to the Carlin award.

Costs to be divided equally between the parties.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

A True Copy.

Attest:
Carl W. Reuss, Clerk

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 27 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1031.

CAPITOL AIRWAYS, INC.,
Petitioners,

v.

THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

BRIEF

Of the Airline Pilots Association, International, in Opposition to Petition for Writ of Certiorari.

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International Association of Machinists, AFL-CIO. et al. v. Central Airlines, Inc., 372 U. S. 682, 10 L. ed. 2d 67 (Apr. 15, 1963) 6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1031.

CAPITOL AIRWAYS, INC.,
Petitioners,

v.

THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

BRIEF

Of the Airline Pilots Association, International, in Opposition to Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

Comes now the Respondent in comformity with Rule 40 (3) of this Court and in reference to the Petition for a Writ of Certiorari, states and recites as follows:

OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported unofficially in 58 LRRM 2404.

STATEMENT OF THE CASE.

Petitioner (hereinafter referred to as "Capitol") is an air carrier operating pursuant to authority conferred by the Civil Aeronautics Board; and is a Tennessee corporation with principal offices in Nashville, Davidson County, Tennessee.

Respondent, Air Line Pilots Association, International (hereinafter referred to as "ALPA") is an unincorporated association organized for the purposes and objects of a labor union, with offices in Chicago, Illinois.

Capitol employs a substantial number of Air Line Pilots and the terms and conditions of employment are set forth in a collective bargaining agreement (R. 3a, 4a).

The collective bargaining agreement provides for the submission of disputes, grievances and other matters for adjudication and final settlement to an arbitration panel. This arbitration panel is known as the System Board of Adjustment (hereinafter referred to as "Board") and was established by agreement between Capitol and ALPA pursuant to a mandate in the Railway Labor Act (R. 4a).

Certain grievances arose and were submitted in accordance with procedures contained in the collective bargaining agreement, resulting in awards by the Board in favor of grievants R. N. Hull, J. L. Carlin, Robert M. Gerhard, and John K. Riley. Capitol refused to comply with the awards of the Board (R. 5a, 6a).

District Court action was initiated by Capitol and a counter-claim filed by ALPA requesting enforcement of the awards (R. 85a-87a). Motions for summary judgment were made and rulings had thereon by the District Court, resulting in an appeal and cross-appeal to the Sixth Circuit (R. 151a-163a).

The Board awards are briefly summarized below:

Riley Award.

The Award shows that Captain Riley was put on the Capitol roster and seniority list of September 7, 1961, as number 110. The Board found that Riley was a furloughed employee; that a letter of recall was sent him on October 13, 1961; and that he accepted said recall. In reporting for work with Capitol, Riley was forced to quit a job with Riddle Airlines in Oklahoma City (R. 80a, 81a). The Board Award stated in part:

> "However, since the records show that Captain Riley is still carried on the Capitol Airways list as a furloughed employee, it must be admitted that Capitol Airways, Inc., must at least in a measure recognize him as an employee since he has not been dropped from the records" (R. 84a).

The Board awarded Captain Riley $4,800.00 to compensate him, in part, for Capitol's refusal to pay his salary after he accepted the recall and reported for duty (R. 84a).

Hull Award.

In the Hull Award, the discharge by Capitol was based on the Operations Manual, which allegedly provides that a crew member can be discharged for smuggling. The Board Award shows that while Captain Hull was in Frankfort, he purchased two musical instruments. On arrival in this country, Hull asked a Stewardess to list these instruments on her declaration and she agreed to do so. Subsequently, the customs officials cleared the instruments and the Stewardess paid the duty on them (R. 59a, 63a-65a).

The Board noted that Hull was Chairman of the Grievance Committee; that he was not guilty of smuggling

since the customs duty had been paid; that the sort of activity complained of was done openly and often (R. 68a, 75a); and as to Capitol's allegations of misconduct, the arbitrator stated:

> "Now I hope these gentlemen don't believe that I can accept such unadulterated claptrap" (R. 74a).

The Board found that Capitol had not attempted to discipline the Stewardess for her part in the episode (R. 75a); and decreed that Hull was to be returned to work. In finding that Hull was not guilty of smuggling, the Board stated:

> "In fact, so much of this is done, and done openly, that the Customs Bureau even has a place on its form to instruct crew members about listing items carried by 'you as an accommodation for others'" (R. 72a).

Gerhard Award.

Gerhard was discharged by Capitol for allegedly refusing to fly a ferry flight. The award of the Board states that there had been "errors", not misconduct, on both sides. The Board found: that Capitol violated the Collective Bargaining Agreement by failing to provide Gerhard with a copy thereof, and by not posting a current seniority list at the station; that both Gerhard and Capitol had an obligation to prevent the Pilot from exceeding his allowable hours for flying during a month; and that Capitol failed to have a proper official available to decide whether Gerhard would exceed his maximum flying hours by undertaking the flight in question. In exonerating Gerhard, the Board stated:

> "Gerhard is responsible for his errors, but he is not responsible for those on the part of the company . . . "

"Section 22 of the Agreement gives the company the **right to discharge for justifiable cause.** In this case, the neutral umpire does not consider the cause for discharge as justifiable" (emphasis added).

The Board directed that Gerhard be reinstated (R. 80a). (Due to an error the complete "Gerhard Award" is not printed in the Joint Appendix. However, the complete award is contained in Exhibit D to the Original Complaint, and the Court is respectfully referred thereto.)

Carlin Award.

The Award in the Carlin case indicated that he was discharged for writing certain letters of protest to Capitol officials concerning terms and conditions of employment. The Board found that the matter was properly before it; that said Board should hear the dispute because the letter of May 3 gave the Board jurisdiction; that the actions on the part of Capitol amounted to condoning the actions of Captain Carlin; and that Captain Carlin should be reinstated without back pay (R. 77a-79a).

The decision of the Sixth Circuit Court of Appeals is correctly set out in Capitol's petition. In the present posture of the case, the Hull, Carlin and Gerhard awards have been ordered enforced, leaving only the Riley award not subject to enforcement.

ARGUMENT.

At the outset it should be noted that this Court has conclusively disposed of all questions presented in this petition for Writ of Certiorari. In **International Association of Machinists, AFL-CIO, et al. v. Central Airlines, Inc.**, 372 U. S. 682, 10 L. ed. 2d 67 (Apr. 15, 1963), all questions raised by this Petition for Writ of Certiorari were affirmatively and unequivocally answered contrary to the position now taken by Capitol. Petitioner fails to show any reason for granting the writ as listed in Rule 19. **International Association of Machinists, AFL-CIO, v. Central Airlines, Inc.**, *supra*.

Respectfully submitted,

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Certificate of Service.

I hereby certify as attorney of record for the Air Line Pilots Association, International, in the above styled and numbered cause in this Court, that I have this date had

mailed by air mail, postage prepaid, to Judson Harwood, Esquire, Nashville Bank & Trust Building, Nashville, Tennessee, attorney of record for the Petitioner at his said proper post office address, two copies of this brief of the Air Line Pilots Association, International, in opposition to petition for writ of certiorari and cross-petition for limited writ of certiorari.

This 26th day of April, 1965.

Cecil D. Branstetter,
216 Third Avenue North,
Nashville, Tennessee.

Office-Supreme Court, U.S.
FILED
MAY 14 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 1031

CAPITOL AIRWAYS, INC.,
Petitioner.

vs.

THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, *Respondent.*

REPLY OF PETITIONER

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REPLY OF PETITIONER

MAY IT PLEASE THE COURT:

Pursuant to Rule 24 (4), petitioner, Capitol Airways, Inc., respectfully submits this very short reply brief to correct very serious misstatements of the record as contained in the brief of respondent in opposition to the granting of the writ.

Hull Award

At Page 4 of respondent's brief it is stated "and as to Capitol's allegations of misconduct, the arbitrator stated:

> "Now I hope these gentlemen don't believe that I can accept such unadulterated claptrap."

The entire paragraph from which this statement is taken commences on Page 73a Appx. and concludes on Page 74a Appx. and reads as follows:

> "The Company in a number of instances during the hearing, but most especially in its concluding statements, claimed that a man 'who has been proven to gamble, to shirk his responsibilities, to cut corners, to avoid Company regulations' should not be allowed to fly their planes, because, as it was put by Mr. Longobardi, 'The next step, sir, will be the result of loss of lives or a great deal of money' (Tr. p. 215), and he implied that the planes and passengers should only be left 'in more competent hands'. Now I hope these gentlemen don't believe that I can accept such unadulterated claptrap. I have been in the industrial field for almost 30 years as an industrial engineer, industrial relations man, consultant and arbitrator, and my experience has never indicated any connection between a person's honesty and competence in doing his job. I understand there were many pirates in days of old who were very competent ship captains. This does not mean that I condone Mr. Hull's actions, but it does mean that I don't think they were quite as heinous as claimed by the Company, or that because he would attempt to smuggle, that his ability and judgment as a pilot becomes impaired."

As further evidence that the System Board was attempting to "dispense its own brand of industrial justice", the opinion of the Board on Page 74a Appx. further states:

> "Obviously the Company cannot allow this sort of activity to occur, nor can it condone these actions or permit its employees to break rules. The point is then whether the breaking of these rules was of such a serious nature that Captain Hull should have been discharged."

Gerhard Award

At Pages 4 and 5 the brief of respondent again incorrectly quotes the record. The quoted statements in respondent's brief do not appear in this record at any point or place, nor are they contained in Exhibit D to the original complaint (Appx. 80a).

Normally, petitioner would not file a reply but felt that it was necessary to correct the erroneous statements used by respondent in its brief in opposition to the granting of the petition.

CONCLUSION

Petitioner respectfully insists that the writ should be granted.

Respectfully submitted,

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Nashville, Tennessee,
Attorney for Capitol Airways, Inc.